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No. 94-6790

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HARVEY F. GARLOTTE,
Petitioner,
v.
KIRK FORDICE, Governor of Mississippi,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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(Appointed by This Court)
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CERTIORARI GRANTED JANUARY 20, 1995

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RELEVANT DOCKET ENTRIES

United States District Court,
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November 20, 1989	— Respondents' Motion to Dismiss for Failure to Exhaust State Remedies
November 29, 1989	— Petitioners' Response to Respondents' Motion to Dismiss for Failure to Exhaust
August 30, 1990	— Report and Recommendation that Petition for Writ of Habeas be Dismissed without Prejudice
September 20, 1990	— Petitioner's Objections to Report and Recommendation
June 27, 1991	— Order Remanding Matter to United States Magistrate for Reconsideration
February 18, 1992	— Report and Recommendation that Petition for Writ of Habeas be Denied
February 24, 1992	— Respondents' Clarification of Exhaustion Issue
June 4, 1992	— Order Adopting United States Magistrate Report and Recommendation that Petition for Writ of Habeas be Dismissed
June 4, 1992	— Judgment Dismissing With Prejudice Petition for Writ of Habeas
June 15, 1992	— Petitioner's Notice of Appeal
June 15, 1992	— Petitioner's Motion for Certificate of Probable Cause
August 4, 1992	— Order of United States District Court that Certificate of Probable Cause Should Not Issue

RELEVANT DOCKET ENTRIES

U.S. Court of Appeals for the Fifth Circuit

March 7, 1994 — Order of Fifth Circuit Granting Petitioner's Motion for Certificate of Probable Cause

September 13, 1994 — Slip Opinion of Fifth Circuit Affirming District Court but on Different Ground that District Court Lacked Jurisdiction Pursuant to 28 U.S.C. § 2254

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

Civil Action No. H89-0187(P)

HARVEY P. GARLOTTE,
Petitioner

versus.

RAY MABUS, GOVERNOR, *et al.*,
Respondent

BRIEF ON REMAND

COMES NOW the respondent in the above styled and numbered cause and files this brief on the question of whether or not petitioner has exhausted his state court remedies.

After further review of the prior filings of petitioner before the Mississippi Supreme Court respondent has discovered that petitioner did if fact raise the grounds found in Ground IV (Petitioner was subjected to double jeopardy) and Ground V (Petitioner's sentence was unusual and disproportionate). The reason for the failure of the state to discover these two grounds is that they were not included in the application to the Mississippi Supreme Court, but in the proposed filing before the circuit court. This proposed filing was attached as the ninth exhibit and appeared, without careful reading, to be part of the prior pleadings filed in another case.

Present counsel apologizes for this oversight and would not submit that petitioner seems to have exhausted his state court remedies.

Wherefore, PREMISES CONSIDERED, respondents respectfully move this Court allow it twenty days from the entry of an appropriate order to file its answer to this petition for writ of habeas corpus.

Respectfully submitted,

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(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

(Title Omitted in Printing)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Harvey Floyd Garlotte pled guilty to the crime of possession of less than one ounce of marijuana with intent to deliver or sell in the Circuit Court of Lamar County, Mississippi on September 16, 1985. He was previously arraigned for the crime December 10, 1984, in Marion County, and his case was assigned to Lamar County on his own motion. Garlotte also pled guilty to two counts of murder on the same day, but he does not now challenge these convictions herein. Garlotte was sentenced to a three-year term in the custody of the Mississippi Department of Corrections for the crime of possession of marijuana with intent to deliver or sell.

Garlotte appealed his conviction directly to the Mississippi Supreme Court, and that court affirmed in *Garlotte v. State*, 530 So.2d 693 (Miss. 1988). After filing several more unsuccessful post-conviction motions, Garlotte then filed his writ for habeas corpus with this court. The State filed its Motion to Dismiss for Failure to Exhaust on November 20, 1989, and a Report and Recommendation was entered by the Magistrate on August 30, 1990, recommending dismissal. The District Judge entered an Order on June 27, 1991, remanding the case to the Magistrate for reconsideration.

Although it is unclear whether or not Garlotte has exhausted his state court remedies on all of his alleged grounds for relief, it appears that a return to the state

courts may prove futile. Thus, it is our recommendation that the exhaustion requirement be waived and that Garlotte's petition be considered on the merits.

Garlotte alleges that his conviction is "illegal and void" based on the following grounds which entitle him to relief:

> 1. The Trial Court erred in accepting Petitioner's guilt plea and did not adequately establish and ensure that Petitioner's plea was voluntary, intelligent and knowing.
>
> 2. Petitioner was denied effective assistance of counsel.
>
> 3. The trial court lacked jurisdiction to entertain and/or accept the Petitioner's guilty plea.
>
> 4. Petitioner was subjected to double jeopardy.
>
> 5. Petitioner's sentence was unusual and disproportionate.
>
> 6. Petitioner's guilty plea was the product of undue influence/coercion and/or misleading information.
>
> 7. Petitioner was incompetent at the time of the guilty plea.
>
> 8. Petitioner's guilty plea was not knowing, intelligent and voluntary.[1]
>
> 9. Petitioner was denied full and fair consideration of his *pro se* pleadings by the Mississippi Courts. (sic)

Garlotte's *primary* attack on his conviction is his allegation that his guilty plea was unlawful for numerous different reasons. Ground Nos. 1, 2, 3, 4, 6, 7, and 8 are all related to the lawfulness of Garlotte's guilty plea, and we shall consider the merits of these grounds as a whole.

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[1] This ground is essentially identical to Ground No. 1.

We have examined the transcript from the lower court's hearing whereby Garlotte entered his plea of guilty to this crime. We agree with the Mississippi Supreme Court's statement in the direct appeal of this case that "Judge Eubanks conducts one of the most thorough and explicit plea hearings this Court has had the opportunity to read. . . . The issues raised by Garlotte are without merit, totally refuted by the lengthy and explicit record of the guilty plea." *Garlotte,* 530 So.2d at 694.

Judge Eubanks explained in detail to Garlotte his rights to plead not guilty and have a trial; he questioned Garlotte thoroughly as to whether the plea was freely and voluntarily given and whether or not anyone had coerced or pressured him. As to competency, when Garlotte mentioned his past alcohol and drug problems, Judge Eubanks questioned him in detail as to how long it had been since he had used alcohol and whether it was out of his system or still affecting his judgment. Garlotte confirmed that he was no longer under the influence as he had not used any drugs or alcohol in three months. The court interrogated him regarding his educational background, determining that he had completed his high school degree (by GED) and could read and write. The Judge had the opportunity to examine the demeanor of Garlotte and could form an opinion as to whether he was competent; the record certainly confirms the judge's decision.

The record indicates that the Judge *affirmatively* found that Garlotte was competent, that the plea was freely and voluntarily given, that no coercion was involved, and that Garlotte understood his rights.

A plea of "guilty" to a charge has a profound effect on subsequent events in a criminal proceeding. In *Boykin v. Alabama,* 395 U.S. 238, 242 (1969), the Supreme Court held that a guilty plea to a criminal charge is "more than admission of conduct; it is a conviction." *See also, Swift v. Lynn,* 870 F.2d 1039, 1041 (5th Cir. 1989);

Long v. McCotter, 792 F.2d 1338, 1345 (5th Cir. 1986). Such a plea waives several federal constitutional rights, such as the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. *Long*, 792 F.2d at 1345. A valid guilty plea waives all nonjurisdictional defects preceding the plea. *United States v. Jennings*, 891 F.2d 93, 95 (5th Cir. 1989); *See also, United States v. Harper*, 901 F.2d 471, (5th Cir. 1990). In *Tollett v. Henderson*, 411 U.S. 258 (1972), the court held that:

> When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.

Id. at 267 (*citing McMann v. Richardson*, 397 U.S. 759 (1970); *Cook v. Lynaugh*, 821 F.2d 1072, 1075 (5th Cir. 1987).[2]

The United States Supreme Court established in *Boykin* that as a matter of due process the court record in criminal proceedings must affirmatively disclose that a guilty plea was entered voluntarily and intelligently. *See also, Gillard v. Scroggy*, 847 F.2d 1141, 1143 (5th Cir. 1988). In *Boykin*, the court reversed a criminal conviction based upon a guilty plea where the record was "wholly silent" on whether the judge asked the defendant any questions or whether the defendant ever addressed the court. *Boykin*,

---

[2] The court, in reaching its conclusion in *Tollett*, relied on a trilogy of cases decided in 1970. *See Brady v. U.S.*, 397 U.S. 742 (1970) (guilty pleas allegedly entered to avoid possibility of death penalty); *McMann v. Richardson*, 397 U.S. 759 (1970) (confession allegedly coerced); *Parker v. North Carolina*, 397 U.S. 790 (1970) (guilty plea allegedly entered to avoid possibility of death penalty).

395 U.S. at 240. The rule governing acceptance of guilty pleas has three core concerns: the plea must be free from coercion, the accused must understand the nature of the charges against him, and the accused must know the direct consequences of his guilty plea. *United States v. Stumpf,* 900 F.2d 842, 844 (5th Cir. 1990). The lower court's interrogation of Garlotte, along with Garlotte's responses, clearly show that these criteria were met.

The court must advise the defendant of the maximum sentence he can receive, and the transcript affirmatively shows that this was done in Garlotte's hearing. *United States v. Daniel,* 830 F.2d 46, 47 (5th Cir. 1987). However, the Supreme Court held in *Hill v. Lockhart,* 474 U.S. 52, 55-56 (1985), that in order for a guilty plea to be valid and binding, a trial court is not required to inform a criminal defendant of collateral consequences that might result from the conviction based on the guilty plea. *See also, Johnson v. Puckett,* 930 F.2d 445 (5th Cir. 1991). In *Hill,* the court affirmed that the procedures for ensuring that guilty pleas are knowingly and intelligently entered are outlined in Rule 11(c), Federal Rules of Criminal Procedures, and the court stated that the Constitution does not require the states to inform defendants about collateral matters such as parole eligibility. *Id.* Furthermore, a defendant who has been advised of the maximum prison term he might receive is fully aware of the consequences of his guilty plea. *Barbee v. Ruth,* 678 F.2d 634 (5th Cir. 1982). Letter perfect compliance with the rule concerning acceptance of guilty pleas is not demanded. *Stumpf, supra,* at 844 *citing United States v. Corbett,* 742 F.2d 173 (5th Cir. 1984).

The record of the guilty plea hearing affirmatively discloses that Garlotte's plea was voluntarily and intelligently made as required by *Boykin.* Many of the complaints Garlotte makes regarding his plea were waived by him due to the plea itself under the foregoing law. It is our opinion that all of the grounds alleged by Garlotte regard-

ing his competency and the voluntariness of the plea are without merit.

Garlotte also attacks his guilty plea by alleging in Ground No. 3 that the trial court had no jurisdiction to entertain his plea due to the invalidity of the indictment. He concludes (without a supporting factual basis) that the indictment was "detained in a deceitful and malicious manner"; the indictment was not signed by the circuit clerk; the grand jury was not properly empaneled; the indictment was "falsified and altered by the district attorney without leave of court"; the grand jury "was not charged concerning the law in relation to the facts"; the grand jury "was not charged with its duties and obligations as an impartial and unbiased judicial body as required by law"; and, the indictment "did not reflect on its face the true weight of the marijuana".

The sufficiency of a state indictment is not a matter for federal habeas corpus relief unless it can be shown that the indictment is so defective that the convicting court had no jurisdiction. *Alexander v. McCotter,* 775 F.2d 595, 598 (5th Cir. 1985) *citing Liner v. Phelps,* 731 F.2d 1201, 1203 (5th Cir. 1984); *Johnson v. Puckett,* 930 F.2d 445 (5th Cir. 1991). For an indictment to be "fatally defective," no circumstances can exist under which a valid conviction could result from the facts provable under the indictment with state law providing the reference point for determining an indictment's sufficiency. *Johnson,* 930 at 447; *Johnson v. Estelle,* 704 F.2d 232, 236 (5th Cir. 1983) *cert. denied,* 465 U.S. 1009, 104 S.Ct. 1006, 79 L.Ed.2d 237 (1984). However, if the question of the sufficiency of the indictment is presented to the highest state court of appeals, then consideration of the question is foreclosed in federal habeas corpus proceedings. *Liner v. Phelps,* 731 F.2d at 1203. Furthermore, in *Alexander v. McCotter, supra,* the United States Court of Appeals for the Fifth Circuit held that:

> An indictment is sufficient if it (1) contains the elements of the offense charged and fairly informs the defendant of the charge against him and (2) enables him to plead an acquittal or conviction and bar a future prosecution for the same offense.

Alexander, 775 F.2d at 599, *citing United States v. Montemayor*, 703 F.2d 109, 117 (5th Cir. 1983).

In Mississippi, all questions regarding the sufficiency of an indictment are determined by reference to Rule 2.05, Uniform Criminal Rules of Circuit Court Practice. *Thames v. State*, 454 So.2d 486, 487 (Miss. 1984). Also, an indictment which tracks the statutory language is generally sufficient to inform the accused of the charge against him. *Cantrell v. State*, 507 So.2d 325, 329 (Miss. 1987); *Cummins v. State*, 515 So.2d 869, 872 (Miss. 1987); *Hickombottom v. State*, 409 So.2d 1337, 1338 (Miss. 1982).

We have reviewed the allegations regarding the indictment in this matter and find that Garlotte's indictment was not so defective under the above discussed law to deprive the convicting court of jurisdiction over the cause. Some of Garlotte's allegations are merely conclusory in nature and are without a factual basis.

Garlotte alleges that he had previously pled guilty to the marijuana possession charge in city court and that the instant conviction violated the Double Jeopardy Clause of the United States Constitution. The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U. S. Constitution, Article V. It protects against three different evils: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *North Carolina v. Pearce*, 359 U.S. 711, 717 (1969). We find Garlotte's argument on this ground to be without merit, as he offers no supporting facts to vali-

date his conclusion that the two guilty pleas were for the same offense. Further, his guilty plea conviction in this case may have waived any such assertion.

Garlotte also argues in his Ground No. 2 that he was denied effective assistance of counsel. We point out that the transcript reflects the following testimony of Judge Eubanks and Garlotte:

> Q. Now, Mr. Bubba Holder here is your attorney?
> A. Yes, sir.
> Q. And he's here in the Courtroom with you, and you have employed him to represent you on these cases?
> A. Yes, sir.
> Q. Now, has he discussed this indictment with you?
> A. Yes, sir.
> Q. Has he discussed with you what needs to be done to defend you on these cases?
> A. Yes, sir.
> Q. All right, did he go over with you what yours rights were on these charges?
> A. I'm not real sure about that one.
> Q. Well, I'm going to go over with you again and so you will understand about them before you enter your plea, but he has discussed the cases and what needs to be done to defend you in these cases?
> A. Yes, sir.
> Q. And you've discussed those in detail with him?
> A. Yes, sir.
> Q. And have you given him the information he needs to properly advise you and represent you on these charges?
> A. Yes, sir.
> Q. All right, you're not holding back any information from him?
> A. No, sir.
> Q. Now, has he taken sufficient time to go over everything with you?
> A. Yes, sir, I believe he has.

Q. Are you satisfied with his services?
A. Yes, sir.
Q. Do you know of anything else that you would want him to do to defend you on these three charges?
A. No, sir.

In order to establish effective assistance of counsel with regard to a guilty plea, *Hill v. Lockhart*, 474 U.S. 52, 58 (1958), holds that the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), must be met. *See also, Williams v. Smith*, 888 F.2d 28, 30 (5th Cir. 1989); *United States v. Green*, 882 F.2d 999, 1002 (5th Cir. 1989); *United States v. Smith*, 844 F.2d 203, 208 (5th Cir. 1988).

In *Strickland*, the Supreme Court held that before post-conviction relief can be granted for ineffective assistance of counsel, the petitioner must establish: (1) that counsel's performance was deficient in that it fell below an objective standard of reasonable professional service; and (2) that this deficient performance prejudiced the defense such that there is a reasonable probability that the outcome of the trial has been undermined and the result would have been different. *Strickland*, 466 U.S. at 687, 688; *See also, United States v. Samples*, 897 F.2d 193, 196 (5th Cir. 1990); *Lavernia v. Lynaugh*, 845 F.2d 493 (5th Cir. 1988); *Bridge v. Lynaugh*, 838 F.2d 770 (5th Cir. 1988); *Thomas v. Lynaugh*, 812 F.2d 225 (5th Cir. 1987). Thus, both a deficiency and resulting prejudice must be shown. *United States v. Lewis*, 786 F.2d 1278, 1281 (5th Cir. 1986). A petitioner's failure to establish both prongs of the *Strickland* test warrants rejection of his claim. *Bates v. Blackburn*, 805 F.2d 569, 578 (5th Cir. 1986).

Under the deficiency prong of the *Strickland* test, a petitioner must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687; *see also, Bridge v. Lynaugh*, 838 F.2d 770, 773

(5th Cir. 1988). However, the Fifth Circuit has noted the following:

> In determining whether counsel's performance satisfies the requirements of the Sixth Amendment, we must inquire whether, considering all of the circumstances, counsel's performance was reasonable under prevailing professional norms. Judicial scrutiny of counsel's performance must be highly deferential; we must make every effort to eliminate the distorting effects of hindsight and evaluate the conduct from counsel's perspective at the time.

Lavernia v. Lynaugh, 845 F.2d 493, 498 (5th Cir. 1988). In applying the first *Strickland* criterion, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional competence, or that, under the circumstances, the challenged action might be considered sound trial strategy. *Bridge v. Lynaugh*, 838 F.2d at 773 *quoting Strickland v. Washington*, 466 U.S. at 689; *Samples*, 897 F.2d at 196. Finally, counsel is given great deference with a strong presumption that counsel has exercised reasonable professional judgment. *Martin v. McCotter*, 796 F.2d 816, 817 (5th Cir. 1986).

In *Hill*, *supra*, the Court stated that in the context of guilty pleas, the first half of the *Strickland* test is nothing more than a restatement of the standard of attorney competence set forth in *Tollett v. Henderson*, 411 U.S. 258 (1973) and *McMann v. Richardson*, 397 U.S. 759 (1970). Both of those decisions hold that where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. *See*, *Hill*, 474 U.S. at 56.

The petitioner must also affirmatively prove "prejudice" in order to meet the *Strickland* test. *Byrne v. Butler*, 845

F.2d 501, 512 (5th Cir. 1988) (citations omitted). In the guilty plea context, "prejudice" occurs if there is a reasonable probability that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial. *United States v. Smith*, 844 F.2d 203, 209 (5th Cir. 1988); *See also, Czere v. Butler*, 833 F.2d 59, 63 (5th Cir. 1987); *Uresti v. Lynaugh*, 821 F.2d 1099, 1101 (5th Cir. 1987). In the instant case, Garlotte has not even alleged that he would have insisted on going to trial.

In our opinion, Garlotte has not met his burden of proving ineffective assistance of counsel under the *Strickland* test and the law as discussed above, and we recommend that no relief be granted on this ground.

Garlotte also alleges in his Ground No. 5 that his three-year sentence, which was the maximum jail sentence allowed under Mississippi law, is unusual and disproportionate. In *Rummel v. Estelle*, 445 U.S. 263 (1980), the Supreme Court stated that "whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy." *Rummel*, 445 U.S. at 283, n.27, *citing Gore v. United States*, 357 U.S. 386, 393 (1958); *see also, Hutto v. Davis*, 454 U.S. 370, 374 (1982).

Moreover, the Supreme Court has held that a reviewing court should not consider the severity of a sentence that has been set within statutory limits, particularly on habeas corpus review. *Townsend v. Burke*, 334 U.S. 736, 741 (1948). The Fifth Circuit has stated, that "while not reviewing the severity of a sentence, this court will, however, carefully scrutinize the judicial process by which punishment was imposed." *United States v. Cimino*, 659 F.2d 535, 537 (5th Cir. 1982); *see also, United States v. Clements*, 634 F.2d 183, 186 (5th Cir. 1981); *United States v. Cauazos*, 530 F.2d 4, 5 (5th Cir. 1976); *Smith v. Wainwright*, 664 F.2d 1194, 1196 (11th Cir. 1976);

United States v. Fay, 267 F.2d 507, 510 (2nd Cir. 1959). As long as the trial court stays within statutory bounds and respects procedural safeguards, the sentence may be reversed only for arbitrary or capricious abuse of discretion. *United States v. Wheeler*, 802 F.2d 778, 783 (5th Cir. 1986); *United States v. Garcia*, 693 F.2d 412, 415 (5th Cir. 1982).

The three-year sentence which Garlotte received was the maximum jail sentence for his crime, but he was not *fined* as the law allowed. Thus, the lower court did not impose the maximum sentence. The record of the guilty plea clearly shows that the trial court was not acting in an arbitrary or capricious manner; in fact, the court was merely honoring the plea bargain agreement entered into by the district attorney and Garlotte. Extenuating circumstances obviously existed when Garlotte's attorney attempted to plea bargain as to his sentence—he was also plea bargaining and being sentenced on two murder charges contemporaneously with this marijuana possession charge.

Since the sentence was within the bounds of Mississippi law and the trial judge was not acting in an arbitrary or capricious manner in imposing the maximum jail sentence, Garlotte is not entitled to any habeas relief based on his sentence.

As his last ground for relief, Garlotte alleges that he was denied full and fair consideration of his *pro se* pleadings by the Mississippi courts. It is clear that to maintain a petition for habeas corpus, the petitioner must be deprived of some right secured to him by the Constitution or the laws of the United States. *Irving v. Thigpen*, 732 F.2d 1215, 1216 (5th Cir. 1983) (citing 28 U.S.C. § 2254(a) (1982); *Baker v. McCollan*, 443 U.S. 137 (1979); *Trussell v. Estelle*, 699 F.2d 256, 259 (5th Cir. 1983)). We are of the opinion that this ground does not present a constitutional issue and, thus, is frivolous for the purposes of habeas relief.

Due to all of the above reasons, it is our opinion that Garlotte is not entitled to relief from this court. We recommend that his petition for writ of habeas corpus be denied.

Parties are hereby notified that failure to file written objections to the findings and recommendations contained in this report within ten days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

This the 13th day of February, 1992.

/s/ Alfred G. Nicols, Jr.
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

(Title Omitted in Printing)

ORDER

This cause came on this date to be heard upon the Report and Recommendation of the United States Magistrate Judge, after referral of hearing by this Court, and the Court, having fully reviewed the Report and Recommendation of the United States Magistrate Judge entered in this cause on or about February 13, 1992, the objections filed by Petitioner, the Response filed by Respondents, and being otherwise fully advised in the premises, finds that said Report and Recommendation should be adopted as the opinion of this Court.

IT IS, THEREFORE, ORDERED that the Report and Recommendation of United States Magistrate Judge Alfred G. Nicols, Jr. entered on or about February 13, 1992, be, and the same is hereby adopted as the finding of this Court, and the petition for writ of habeas corpus is hereby dismissed.

A separate judgment will be entered herein in accordance with this Order as required by Rule 58, Fed.R.Civ.P.

SO ORDERED AND ADJUDGED this the 3rd day of June, 1992.

/s/ Charles W. Pickering, Sr.
CHARLES W. PICKERING, SR.
United States District Judge

[Filed Jun. 4, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

(Title Omitted in Printing)

JUDGMENT

This matter having come on to be heard on this date upon the Report and Recommendation of the United States Magistrate Judge entered in this cause on or about February 13, 1992, and the Court, after a full review of the record, having adopted said Report and Recommendation as the finding of the Court by Order dated June 3rd, 1992, finds that this matter should be dismissed.

IT IS THEREFORE, ORDERED AND ADJUDGED that this cause be, and the same is hereby dismissed with prejudice.

SO ORDERED AND ADJUDGED this the 3rd day of June, 1992.

/s/ Charles W. Pickering, Sr.
CHARLES W. PICKERING, SR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

(Title Omitted in Printing)

RESPONDENT'S CLARIFICATION OF EXHAUSTION ISSUE IN REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

COMES NOW respondent and files this clarification of its position on the exhaustion issue included in the above styled and numbered cause.

In his Report and Recommendation in this case the Magistrate Judge made the following statement:

> Although it is unclear whether or not Garlotte has exhausted his state court remedies on all of his alleged grounds for relief, it appears that a return to the state court may prove futile. *Thus, it is our recommendation that the exhaustion requirement be waived and that Garlotte's petition be considered on the merits.* [Emphasis added.]
>
> R. & R. at 2.

This confusion arises from our Brief on Remand filed on July 29, 1991, after this case was remanded to the Magistrate Judge by the District Court for reconsideration. In earlier responses we claimed that Grounds IV and V were not exhausted. On review of the filings by new counsel we discovered that these claims had in fact been exhausted by petitioner. We stated in that document:

> Present counsel apologizes for this oversight and would *not* submit that petitioner seems to have exhausted his state court remedies. [Emphasis added.]
>
> Brief on Remand at 1.

The word *not* was a typographical error and the phrase should read "and would *now* submit that petitioner seems to have exhausted his state court remedies." This was intended as a submission that the state was waiving the exhaustion issue.

As is clear from the rulings of the United States Supreme Court in *Castille v. Peoples*, 489 U.S. 346, 109 S.Ct. 1056, 103 L.Ed.2d 379 (1989) and *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) the issue of exhaustion is waivable by the state. However, if the State refuses to waive the issue then the habeas petition must be dismissed as a mixed petition and the petitioner allowed to repair to the state courts to exhaust the unexhausted claims. This is a decision that is the State's to make and not one for the federal courts unless it appears that such would be futile. Of course, a claim can be considered exhausted because it is clearly barred from consideration under state law. It would be futile to return to state court because the state courts would refuse to consider it because it is procedurally barred. This claim is then considered exhausted and the claim must be treated as a claim barred from consideration by the federal courts. *Castille v. Peoples*, 103 L.Ed.2d at 387.

So that there is no confusion in this case that may come back to haunt the resolution of this petition, the State would submit that petitioner has exhausted the claims that he now raises.

We file this brief not as an objection to the Report and Recommendation of the Magistrate Judge, but to clarify the State's position on the issue of exhaustion of petitioner's state court remedies.

Respectfully submitted,

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(Certificate of Service Omitted in Printing)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7396

HARVEY F. GARLOTTE,
Petitioner-Appellant,

versus

KIRK FORDICE, Governor,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. CA-H89-0187(P)(N)

ORDER:

Harvey F. Garlotte moves this Court for a certificate of probable cause (CPC). Garlotte argues that the district court prematurely dismissed his petition without requiring the respondent to file an answer and without conducting an evidentiary hearing.

Rule 4 of the Rules Governing Section 2254 Cases permits the district court to dismiss the petition without requiring the state to respond only if the claims are frivolous, or it appears from the face of the petition that the petitioner is not entitled to relief. *McNeil v. Blackburn*, 802 F.2d 830, 833 (5th Cir. 1986). In his petition Garlotte alleged, *inter alia*, that his guilty plea was involuntary and that he was denied effective assistance of counsel. If Garlotte is able to prove these allegations he may be entitled to habeas relief. *See McNeil*, 802 F.2d at 832-33 (when a defendant pleads guilty on the basis of a promise by defense counsel or the prosecutor,

breach of the promise, even if the promise is unfulfillable, taints the voluntariness of the plea). The district court did not advert to these specific allegations.

Therefore, IT IS ORDERED that Garlotte's motion for CPC is GRANTED. IT IS FURTHER ORDERED that the respondent brief the issue whether the district court prematurely dismissed the petition without requiring an answer and without conducting an evidentiary hearing. *See McNeil*, 802 F.2d at 833; *Tijerina v. Estelle*, 692 F.2d 3, 5-6 (5th Cir. 1992) (an evidentiary hearing is required only if factual disputes cannot be resolved on the record).

/s/ John M. Duhé, Jr.
JOHN M. DUHÉ, JR.
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

(Title Omitted in Printing)

Appeal from the United States District Court
for the Southern District of Mississippi

Aug. 19, 1994

Before SMITH, EMILIO M. GARZA and PARKER, Circuit Judges.

PER CURIAM:

Petitioner Harvey F. Garlotte ("Garlotte") brings a *habeas corpus* action pursuant to 28 U.S.C. § 2254, challenging a 1985 state conviction for possession of marijuana. The district court, adopting the magistrate judge's Report and Recommendation, dismissed the petition for failure to exhaust state remedies without requiring the respondent to file an answer. We granted Garlotte's request for a Certificate of Probable Cause, ordering Respondent Kirk Fordice ("Fordice") to brief the issue whether the district court prematurely dismissed Garlotte's petition without requiring an answer or conducting an evidentiary hearing. Concluding that under recent United States Supreme Court precedent Garlotte was not "in custody" for purposes of § 2254, we affirm the district court's dismissal of the petition, but on the separate ground of lack of jurisdiction pursuant to 28 U.S.C. § 2254.

FACTS AND PROCEDURAL HISTORY

In 1985, Garlotte pleaded guilty to one count of possession with intent to deliver or sell one ounce or less of marijuana and was sentenced to three years imprisonment. On the same day he pleaded guilty to two counts of mur-

der and received two life sentences, which the court ordered to run concurrently. The court also ordered that the concurrent life sentences were to run "consecutive, and after" the three year marijuana conviction. Garlotte did not appeal his marijuana conviction, and his two state post-conviction motions were denied. He is currently eligible for parole consideration on March 1, 1996.

In 1989, Garlotte filed a federal petition for *habeas corpus* relief challenging the 1985 marijuana conviction. Fordice filed a motion to dismiss for failure to exhaust state habeas remedies, and the magistrate judge recommended that the petition be dismissed with prejudice. The district court remanded the matter to the magistrate for reconsideration.

On remand, the magistrate recommended dismissing the petition without requiring Fordice to file an answer, concluding that although it was unclear whether Garlotte had exhausted his state remedies, even if they were unexhausted the requirement should be waived bcause exhaustion would be futile. After reviewing the magistrate's Report and Recommendation, the district court adopted it, dismissed the petition, and denied Garlotte's request for a Certificate of Probable Cause.

DISCUSSION

For the first time on appeal, Fordice argues Garlotte's habeas petition should be dismissed for lack of subject matter jurisdiction because he is not "in custody" within the meaning of 28 U.S.C. § 2254. A challenge to subject matter jurisdiction may be raised for the first time on appeal because it may not be waived. *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1180 (5th Cir.1987), *cert. denied*, 493 U.S. 851, 110 S.Ct. 150, 107 L.Ed.2d 108 (1989). Therefore, we address the question of whether Garlotte is "in custody" under the 1985 marijuana conviction.

Federal district courts lack subject matter jurisdiction to entertain § 2254 actions if, at the time the petition is

filed, the petitioner is not "in custody" under the conviction or sentence which the petition attacks. *Maleng v. Cook*, 490 U.S. 488, 491, 109 S.Ct. 1923, 1925, 104 L.Ed.2d 540 (1989); see also *Hendrix v. Lynaugh*, 888 F.2d 336 (5th Cir. 1989). Fordice argues that under *Maleng*, Garlotte is not "in custody" because his three year sentence for marijuana conviction was fully expired before he filed his habeas petition with the district court. Specifically, Fordice contends that according to Garlotte's record at the Mississippi Department of Corrections, he was discharged from the marijuana conviction on June 1, 1986. He did not file his petition for habeas relief in federal court until 1989, after he was already serving time for the two concurrent life sentences for murder. Therefore, because the marijuana conviction he now attacks was not used for enhancement purposes for the concurrent life sentences for murder, and because the marijuana conviction is fully expired, Garlotte is not "in custody" for purposes of § 2254.

Garlotte does not challenge Fordice's contention that his three year marijuana sentence has expired, but argues instead that the Supreme Court's decision in *Peyton v. Rowe*, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968), holding that a prisoner serving consecutive sentences is "in custody" under any one of the sentences, controls this case. Garlotte further argues that there exists a "positive and demonstrable" nexus between his current custody under the murder sentences and the prior marijuana conviction such that his challenge meets the jurisdictional requirements of § 2254. *Willis v. Collins*, 989 F.2d 187 (5th Cir.1993), quoting *Young v. Lynaugh* 821 F.2d 1133, 1137 (5th Cir.1987), *cert. denied*, 484 U.S. 986, 108 S.Ct. 503, 98 L.Ed.2d 501 (1987), and *cert. denied*, 484 U.S. 1071, 108 S.Ct. 1040, 98 L.Ed.2d 1004 (1988). Specifically, he contends that but for his marijuana conviction, he would have been eligible for parole consideration on June 5, 1995, instead of March 1, 1996.

This Court has held that a petitioner can challenge a fully expired sentence if the expired sentence delayed the time for which the petitioner could receive credit for time served on the current sentence. *Cappetta v. Wainwright,* 406 F.2d 1238, 1239 (5th Cir.), *cert. denied,* 396 U.S. 846, 90 S.Ct. 55, 24 L.Ed.2d 96 (1969). Since *Cappetta,* however, the Supreme Court stated in *Maleng:*

> We have never held, however, that a habeas petitioner may be "in custody" under a conviction when the sentence imposed for that conviction has *fully expired* at the time the petition is filed.

Maleng, 490 U.S. at 491, 109 S.Ct. at 1925 (emphasis in original). Therefore, to the extent that the Supreme Court's decision in *Maleng* is in conflict with this Court's decision in *Cappetta,* we now follow the rule established by *Maleng.*

In *Peyton,* the Supreme Court held that a petitioner who was serving consecutive sentences imposed by the state court is "in custody" under any one of those sentences. *Peyton,* 391 U.S. at 67, 88 S.Ct. at 1556. Unlike Garlotte, however, the petitioners in *Peyton* were challenging a sentence they had not yet begun to serve. Garlotte attempts only to challenge a sentence that is "fully expired" under the definition established by the Supreme Court in *Maleng.* Therefore, Garlotte's challenge to his "fully expired" marijuana conviction is not controlled by the Supreme Court's decision in *Peyton* because he is not attempting to challenge a sentence he has not yet begun to serve.

As for Garlotte's contention that because his parole consideration date has been delayed by the marijuana conviction a nexus exists between the marijuana conviction and the murder conviction, we find that this argument too must fail. As the Supreme Court stated in *Maleng:*

> [O]nce the sentence imposed for a conviction has completely expired, the collateral consequences of

> that conviction are not themselves sufficient to render an individual "in custody" for the purposes of a habeas attack upon it.

Maleng, 490 U.S. at 492, 109 S.Ct. at 1926. Because Garlotte's parole delay merely constitutes a collateral consequence of his marijuana conviction, he has failed to allege a "positive and demonstrable" nexus between the marijuana conviction and the murder sentences he is now serving in order to meet the requirements of the *Maleng* exception established by this Court in *Willis*. Having found that Garlotte is not "in custody" for purposes of subject matter jurisdiction, we decline to address the other issues he raises in his petition. Accordingly, we AFFIRM the district court's dismissal, but on the separate ground of the district court's lack of jurisdiction pursuant to 28 U.S.C. § 2254.

IN THE CIRCUIT COURT
LAMAR COUNTY
STATE OF MISSISSIPPI

#6011-2

STATE OF MISSISSIPPI

versus

HARVEY FLOYD GARLOTTE

IN THE MATTER OF
DEFENDANT'S PLEA OF GUILTY

[2] IN OPEN COURT, SEPTEMBER 16, 1985

DEFENDANT HARVEY FLOYD GARLOTTE, after having been first duly sworn, testified under oath as follows, to-wit:

QUESTIONS BY THE COURT:

Q. All right, state your full name?

A. Harvey Floyd Garlotte, Jr.

Q. Mr. Garlotte, you're aware that you have been charged with possession of marijuana with the intent to deliver or sell one ounce or less, and it was in the Circuit Court of Marion County and was transferred from that Circuit Court over here to Lamar County?

A. Yes, sir.

Q. And that case was set for trial for today?

A. Yes, sir.

Q. It's my understanding that you wish to enter a plea in that matter?

A. Yes, sir.

Q. It's also my understanding that you also wish to enter a plea in Number—Case Number 4230-2 and 4231-2 that are still in the Circuit Court of Marion County?

A. Yes, sir.

Q. And that was charging you with murder in 4230 and the same charge in 4231?

A. Yes, sir.

Q. And it is your desire at this time to enter a plea on those charges?

A. Yes, sir.

Q. All right, now rather than have those charges transferred to Lamar County for the plea, I'm going to allow you to enter your plea in Lamar County, but they are going to remain on the Circuit Court docket of Marion County.

[3] A. Yes, sir.

Q. All right, you have no objections to that?

A. No, sir.

BY THE COURT: All right, Mr. Holder, do you have any objections to that?

BY MR. HOLDER: No, sir.

BY THE COURT: All right, he's going to enter a plea in all three of these charges?

BY MR. HOLDER: That's correct.

BY THE COURT: And do it at one time?

BY MR. HOLDER: That's correct, your Honor.

QUESTIONS BY THE COURT: (Continuing)

Q. All right, how old are you, Mr. Garlotte?

A. Twenty-seven.

Q. Are you married?

A. Yes, sir.

Q. All right, do you have any children?

A. Yes, sir.

Q. All right, what are their ages?

A. Four months and two years.

Q. Now, where do you live?

A. Columbia.

[4] Q. What was your last occupation?

A. Carpenter.

Q. Now, what level of education did you reach?

A. G.E.D.

Q. So you have a high school degree?

A. Yes, sir.

Q. And you can read and write then?

A. Yes, sir.

Q. Now, you have been charged, as I said, in these three charges, two charges of murder and the other charge of possession of a controlled substance. Now, have you read those indictments?

A. Yes, sir.

Q. Did you understand those indictments?

A. Yes, sir.

Q. You understand what a charge is and what an indictment is?

A. Yes, sir.

Q. Now, you understand that an indictment is not evidence of your guilt and cannot be used against you in any way?

A. Yes, sir.

Q. It's just a means of bringing this case for determination of whether you're innocent or guilty of the charge?

A. Yes, sir.

Q. Now, you understand about being under oath?

A. Yes, sir.

Q. And that you can receive a ten year prison sentence if you don't tell me the truth in answer to my questions?

[5] A. Well, I didn't know about the sentence until now, but yes, sir.

Q. Well, I want you to be aware of that anyway because it's very important that you tell me the truth.

A. Yes, sir.

Q. Now, there's another reason that it's important that you tell me the truth and that is that I'm asking you these questions for a reason.

A. Yes, sir.

Q. And the reason is that before you enter your plea, I want to be sure that you understand about your rights, and that whatever plea that you enter is freely and voluntarily entered by you.

A. Yes, sir.

Q. So the only way I can find out that is from what you tell me. I can look at your demeanor and the way you answer my questions, but I still need the information that you tell me yourself in these questions.

A. Yes, sir.

Q. And depending on how you plead, it may be too late to change your answers or remember something else, and so you need to be sure that your answers are accurate and if you do not understand anything, then ask me about it, and I'll try to explain it.

A. Yes, sir.

Q. If you feel like I need some additional information other than the questions I ask you, feel free to volunteer that also.

A. All right.

Q. Now, Mr. Buba Holder here is your attorney.

A. Yes, sir.

[6] Q. And he's here in the Courtroom with you, and you have employed him to represent you on these cases?

A. Yes, sir.

Q. Now, has he discussed this indictment with you?

A. Yes, sir.

Q. Has he discussed with you what needs to be done to defend you on these cases?

A. Yes, sir.

Q. All right, did he go over with you what your rights were on these charges?

A. I'm not real sure about that one.

Q. Well, I'm going to go over with you again and so you will understand about them before you enter your plea, but he has discussed the cases and what needs to be done to defend you in these cases?

A. Yes, sir.

Q. And you've discussed those in detail with him?

A. Yes, sir.

Q. And have you given him the information he needs to properly advise you and represent you on these charges?

A. Yes, sir.

Q. All right, you're not holding back any information from him?

A. No, sir.

Q. Now, has he taken sufficient time to go over everything with you?

A. Yes, sir, I believe he has.

Q. Are you satisfied with his services?

[7] A. Yes, sir.

Q. Do you know of anything else that you would want him to do to defend you on these three charges?

A. No, sir.

Q. Now, it's not going to do much good to look at him because I want to try to find out—I'm asking you the questions there, too. You don't feel like you need any additional time?

A. No, sir.

Q. You don't need any time to go over anything with your family or any friends before entering any plea?

A. No, sir.

Q. If you do, we can give you some additional time because depending on what your plea is, it may be too late later on. Now—

BY MR. HOLDER: Your Honor, could I interrupt. I think what he is hesitating about is that he's had a problem for some time and he's been evaluated to determine exactly what his status was, and I feel like he's capable now to decide whether or not he needs any more time. I think that's why he was hesitate, your Honor.

QUESTIONS BY THE COURT: (Continuing)

Q. All right, let me go into that, Mr. Garlotte. You say you have had in the past a problem?

[8] A. Yes, sir, I've been to the alcoholic treatment center and been under a Psychologist for a while.

Q. What about other drugs? I mean, do you have a narcotic problem, too?

A. Yes, sir, but I've never been to any treatment programs or anything like that, but just for alcohol.

Q. How long has it been since you've been on any drugs or alcohol?

A. Three months.

Q. Do you feel like you've got most of it out of your system?

A. Yes, sir.

Q. And it does not seem to affect you now in understanding me.

A. No, sir.

Q. You can understand me?

A. Yes, sir.

Q. Now, you don't have any emotional or physical handicap or any other type thing like that to keep you from understanding my questions?

A. No, sir.

Q. Or from understanding what we're doing here and what's going on in the Courtroom?

A. No, sir.

Q. All right, it does not appear to me to be that way so I need to be sure of that before you enter your plea. Now, you will be given an opportunity on each of these charges, each one separately, to plead either guilty or not guilty.

[9] A. Yes, sir.

Q. Those are your two choices, and whatever you decide, we want to be sure that you're the one that makes that decision.

A. Yes, sir.

Q. Now, if you plead not guilty, you have certain rights. One of those rights is to have a fair and impartial jury to decide whether you're innocent of the charge or guilty of the charge.

A. Yes, sir.

Q. You understand that?

A. Yes, sir.

Q. And we will be sure that you have an impartial jury and one of the reasons that we had this other case transferred over here to be tried today was to be sure of that. You understand that?

A. Yes, sir.

Q. Now, in this County we were going to have a panel of thirty or forty people, and they were selected at random from around this County, and they were going to come in and sit on the main panel, and we would select twelve jurors from that panel to hear your case.

A. Yes, sir.

Q. You understand that?

A. Yes, sir.

Q. In selecting those twelve, you have the right to dismiss any six of them without giving a reason. You just may not like their occupation or how they comb their hair or something of that nature, and you can have those dismissed. You understand that?

A. Yes, sir.

[10] Q. Additionally, you can have others dismissed where you might show that they would lean one way or the other or against you in some way.

A. Yes, sir.

Q. And so we will impanel a jury, and that jury will not have any preconceived notions about the matter, and they will limit their consideration in this case to just the evidence that comes out at the trial. You understand that?

A. Yes, sir.

Q. They won't even consider this indictment as evidence against you, and that's another one of your rights. You have the right to be presumed innocent of these charges until you either plead guilty to them or a jury finds you guilty.

A. Yes, sir.

Q. You understand that?

A. Yes, sir.

Q. Now, with that right, requires the State—they have the burden of proving you guilty of the charge, and you do not have to prove anything yourself. You don't even have to prove yourself innocent. They have to prove you guilty. You understand that?

A. Yes, sir.

Q. That's their burden, and they have to prove it beyond a reasonable doubt. Now, no one really knows what a reasonable doubt is, but if a juror has a reasonable doubt about your guilt, then that juror could not find you guilty. You understand that?

A. Yes, sir.

Q. In fact, they would have to find you not guilty. They would have to—if someone had a reasonable [11] doubt, then they would have to vote not guilty. You understand that?

A. Yes, sir.

Q. Now, as the case proceeds to trial, the State will put their witnesses on and other evidence that they may have, and your attorney, Mr. Holder, will be there to protect your interest, and he will be there to protect your rights, and he's a very good Criminal Trial attorney, and he knows the rules of evidence and the rules of procedure and law so that he will protect your rights. Are you aware of that?

A. Yes, sir.

Q. Additionally, I'm not here representing the prosecution or representing you. I'm here to be sure that everyone's rights are protected in this trial, and I will even be sure your rights are protected. You understand that?

A. Yes, sir.

Q. Now, what Mr. Holder will do is when some evidence is offered for this jury that is not proper, such as maybe hearsay evidence, what somebody told somebody else or if you had given a statement and it wasn't freely and voluntarily given by you, then he would object to that evidence and this jury would not consider that evidence at this trial. You understand that?

A. Yes, sir.

Q. Now, additionally, he will be there to cross examine their witnesses to show that they are not telling the truth or that they just don't know anything about the matter. You understand that?

A. Yes, sir.

[12] Q. So at the conclusion of the State's case, then you have the right to put your own case on. You can subpoena witnesses with Mr. Holder's help or other documents or anything like that to show that you are innocent of this charge. You understand that?

A. Yes, sir.

Q. Additionally, you can get on the witness stand like you are now and testify to the jury, but also one of your rights is you have the right against self-incrimination and so no one can make you testify. The only way you would be able to testify is if you wanted to.

A. Yes, sir.

Q. You understand that?

A. Yes, sir.

Q. Now, at the conclusion of the trial, the jury will retire for the verdict, and they will consider only the evidence that's come out at the trial and only the law that applies to that evidence, which I will give them, and then if they have a reasonable doubt about your guilt, then they have to come back and vote not guilty, and you would be discharged. You understand that?

A. Yes, sir.

Q. In other words, even if one of them had a reasonable doubt, the others could not find you guilty. In other words, it takes all twelve of them to either find you guilty or not guilty. You undertsand that?

A. Yes, sir.

Q. So if one of them has a reasonable doubt, and the other eleven say they have no doubt, then that would be what we call a hung jury. There would be no verdict in that case, and we would try you again. You understand that?

[13] A. Yes, sir.

Q. Now, additionally, though, if they were to find you guilty, you have a right to appeal that to the Mississippi Supreme Court, and it's an automatic right. No one can take that away from you, and your attorney, Mr. Holder, would be there to assist you in that appeal. You understand that?

A. Yes, sir.

Q. And if—even if you could show me through your attorney that there had been some error during the trial and the jury found you guilty, then we would set aside that verdict of guilt and give you a new trial. You understand that?

A. Yes, sir.

Q. So all throughout this procedure your rights will be protected. You understand that?

A. Yes, sir.

Q. All right, now if you were to plead guilty, however, to these charges, there would be no need for a trial. You would be found guilty, and there would not be any jury determination and the State wouldn't have to prove you guilty, and there would be nothing to appeal from, and that would be the end of it, and additionally, you would be giving up your right against self-incrimination. If you pled guilty, you might have to testify about this incident. You understand that?

A. Yes, sir.

Q. Now, have you been advised as to what the maximum penalty is on each one of these?

A. I believe three years on the marijuana and life on each of the others.

[14] Q. That's what you were advised?

A. Yes, sir.

BY THE COURT: Now, Mr. Douglass, is that your understanding?

BY MR. DOUGLASS: With the only exception being a fine on marijuana, but because of his situation, I don't imagine he would be able to pay that.

QUESTIONS BY THE COURT: (Continuing)

Q. All right, you understand about there's a fine, too?

A. Yes, sir.

Q. The fine in this case would be up to three thousand dollars. Now, you are aware, too, that those can be run one on top of the other?

A. Yes, sir.

Q. You understand what I mean by that?

A. Yes, sir.

Q. Now, if you plead guilty on these charges, the District Attorney's office may make a recommendation for a sentence, and in fact, we've had several here today—have you been in the Courtroom when we've had the pleas today?

A. No, I—

Q. You didn't hear about that?

A. No, sir.

Q. Well, in those cases, I think one of them, they pled without the District Attorney's office even making a recommendation, and in the other one, I think they did [15] make a recommendation. So you understand that they may do either one of those?

A. Yes, sir.

Q. I'm not sure what they are going to do or what they are going to recommend, but that is only a recommendation.

A. Yes, sir, it's ultimately up to you.

Q. Right, that's correct. What kind of sentence you get and how that sentence is served is going to be left up to me.

A. Yes, sir.

Q. And your attorney can't promise you you're going to get a set sentence or you're going to even serve that sentence.

A. Yes, sir.

Q. You understand all this?

A. Yes, sir.

Q. Now, what I normally do and again even today, I think there was one where we had a pre-sentence report and another one where we did not have a pre-sentence report, but what I would normally do would be to order a pre-sentence report if you were to plead guilty, and that would look into your background and into the background of the offense and using that, I would decide the sentence along with their recommendation. You understand that?

A. Yes, sir.

Q. Now, since you've been arrested on this charge, has anyone mistreated you in any way to get you to plead guilty?

A. No, sir.

Q. No one has beaten you or threatened you or [16] tried to intimidate you in some manner to get you to plead guilty?

A. No, sir.

Q. Has anyone promised you anything to get you to plead guilty?

A. No, sir, no one has promised me anything. I understand that negotiations between the District Attorney and my lawyer have been going on.

Q. Right, so they may make a recommendation—

A. For a recommendation, yes, sir.

Q. For a recommendation?

A. Yes, sir.

Q. But you do understand that is only a recommendation?

A. Yes, sir, I understand that.

Q. All right, are you ready to enter your plea?

A. Yes, sir.

Q. Do you need me to explain anything to you?

A. No, sir, I don't.

Q. Do you need to offer anything more before you enter your plea?

A. No, sir.

Q. Now, your answers have been truthful?

A. Yes, sir.

Q. And this plea that you're about to enter is going to be your own decision?

A. Yes, sir.

Q. And you are ready to enter it?

A. Yes, sir.

Q. If you will step down with your attorney, I'll ask the State to read the indictments.

[17]

INDICTMENT IN CAUSE NUMBER 6011-2 READ TO THE DEFENDANT BY THE DISTRICT ATTORNEY, WHEREUPON THE DEFENDANT ENTERED A PLEA OF GUILTY TO THE CHARGE OF POSSESSION OF MARIJUANA WITH THE INTENT TO DELIVER OR SELL ONE OUNCE OR LESS.

INDICTMENT IN CAUSE NUMBERS 4230-2 AND 4231-2 READ TO THE DEFENDANT BY THE DISTRICT ATTORNEY, WHEREUPON THE DEFENDANT ENTERED A PLEA OF GUILTY IN BOTH CAUSE NUMBERS TO THE CHARGE OF MURDER IN BOTH CAUSE NUMBER.

BY THE COURT: All right, let the record show that the defendant has entered a plea of guilty in Cause Number 6011-2, 4230-2 and 4231-2.

All right, Mr. Garlotte, you can have a seat back on the witness stand.

All right, Mr. Douglass, does the State have a recommendation for sentencing on these three charges?

BY MR. DOUGLASS: The State does, your [18] Honor. It is our recommendation that the defendant receive a three year sentence in Cause Number 6011-2, and in that cause, we're asking the Court to allow us to nolle prosse the charge against Donna Garlotte, but also asking that consecutive to the charge in 6011-2 that the Defendant receive a life sentenec in 4230-2 and a life sentence in 4231-2, but that those two life sentences run concurrent. In effect, what we're asking the Court is for one three year term and two consecutive—consecutive to that three year term, two concurrent life terms.

BY THE COURT: Let me see if I understand it then. He's to receive a life term in both of these cases to run concurrent.

BY MR. DOUGLASS: Right.

BY THE COURT: He would then have a three year sentence on the [19] other charge to run consecutive to those two life sentences. That is correct?

BY MR. DOUGLASS: Either that way, your Honor or allow the three years to run first. In other words, we're just talking about a total of three years and then life or life and then three years.

BY THE COURT: All right, sir. Mr. Holder, is that your understanding of the recommendation?

BY MR. HOLDER: Yes, sir, it's my understanding that the possession case is to run first and then the two life sentences.

QUESTIONS BY THE COURT: (Continuing)

Q. All right, Mr. Garlotte, is that your understanding of the recommendation?

A. Yes, sir.

Q. And that's what was discussed with you?

A. Yes, sir.

Q. So we would run the two life sentences together, and they would run the three year sentence either first or after the life sentence?

[20] A. Yes, sir.

Q. Now, you've had these charges read to you, and you have changed your plea from not guilty to guilty?

A. Yes, sir.

Q. And you're pleading guilty because you are guilty?

A. Yes, sir.

Q. You did commit the offenses as outlined in the indictments?

A. Yes, sir.

Q. Now, you've told me that no one has promised you anything to get you to plead guilty?

A. No, sir.

Q. And no one has mistreated you or coerced you in any way to get you to plead guilty?

A. No, sir.

Q. And you've told me that your plea was going to be your own decision and freely and voluntarily made?

A. Yes, sir.

Q. And that is the case?

A. Yes, sir.

Q. Now, you've told me that you understood what's going on and your past drug problem, that was out of your system at this time?

A. Yes, sir.

Q. So that you do understand what has gone on in the Courtroom?

A. Yes, sir.

Q. You've been in jail now for—

A. Three months.

Q. Three months?

[21] A. A little longer than three months.

BY THE COURT: All right, is there any request for a pre-sentence in this matter?

BY MR. DOUGLASS: Judge, I have no knowledge of any previous convictions or felonies. This man was charged before in Marion County, and it was reduced at that time, and we did a backcheck on him, and I doubt it would make a whole lot of difference. I don't think there's any other convictions, I cannot tell the Court there's absolutely not. I'm not requesting a pre-sentence report.

BY THE COURT: All right, Mr. Holder, is there any necessity for a pre-sentence?

BY MR. HOLDER: No, sir.

QUESTIONS BY THE COURT: (Continuing)

Q. All right, Mr. Garlotte, do you have any other criminal charges in your background anywhere?

A. Just some misdemeanors, a D.U.I, malicious mischief, simple assault, disturbing the peace and [22] possession of marijuana.

Q. But you have no felony convictions?

A. No, sir.

BY THE COURT: All right, has the law enforcement been consulted in this matter?

BY MR. DOUGLASS: Yes, sir. You might ask the Sheriff.

BY THE COURT: All right, Sheriff, have you been consulted concerning this recommendation for sentence?

BY SHERIFF McKENZIE: Yes, sir.

BY THE COURT: Do you have any objection to it or do you think we need a pre-sentence report?

BY SHERIFF McKENZIE: I wouldn't think we do.

BY MR. DOUGLASS: Judge, there is a matter of some property that I talked to the Sheriff about returning to Mr. Garlotte's wife or his mother, one or the other, and the Sheriff has no objection [23] to that. It came out of one of the cases.

BY THE COURT: Has the victim's family been consulted?

BY MR. DOUGLASS: Judge, the only family in the case that I've been able to determine is an estranged wife who—they have been talked to by law enforcement when the case first came about, but it's an unusual situation in that they had charges against the deceased for child molesting at the time the deceased was killed, and I have not had any contact with these people since then. So I assume that they really don't—

BY THE COURT: So we know of no immediate family in the area?

BY SHERIFF McKENZIE: No, sir, the closest one I know of would be Mrs. Reid herself, but really he wasn't her son.

[24] QUESTIONS BY THE COURT: (Continuing)

Q. All right, Mr. Garlotte, do you understand that I will give you one last chance to withdraw your plea?

A. Yes, sir.

Q. Now, do you wish to withdraw your plea?

A. No, sir.

Q. Do you want me to accept your plea?

A. Yes, sir.

Q. And you're telling me that this was freely and voluntarily entered by you?

A. Yes sir.

Q. And you understood about your rights?

A. Yes, sir.

Q. And you understand that by pleading guilty now, you've given up those rights?

A. Yes, sir.

Q. Now, based upon you telling me that, I'm going to find you guilty of possession of marijuana with the intent to deliver or sell one ounce or less in 6011-2 here in Lamar County Circuit Court and find you guilty of murder in Cause Number 4230-2 and 4231-2 in Marion County Circuit Court. You have no objection to that—to those Marion County matters being taken up at this time?

A. No, sir.

Q. Now, based upon what you've told me and also in answer to my questions—and you have told me the truth?

A. Yes, sir.

Q. Based upon that, I'm going to determine that your plea was freely and voluntarily given by you, and that you understood about your rights and what rights you were giving up.

[25] A. Yes, sir.

Q. Now, before I decide on whether to have a presentence report or not and before sentencing, I want to ask you about the incident, particularly the murder incident. First let me ask you about this possession of marijuana. What type of marijuana was it? Was it plants or was it already in bags or—

A. It was just in frisbies. We just smoked some, and then they found a butt that my wife had been saving in the drawer.

Q. And what—where did you obtain this marijuana?

A. I forget where I—it was in Hattiesburg, your Honor.

Q. All right, then on the murder charge, in those particular incidents, tell me about the facts as you recall them.

A. Well, we were—a bunch of us guys had been down at the river drinking and partying, you know, smoking some pot, and we all went up to the store to get some—well, we didn't all go. Greg and Jeff Willoughby and myself went up to the store to get some more beer, and

I called home, and my wife had told me that Ray went up and told the Sheriff that I was suppose to be selling marijuana and I couldn't understand that, why he would go tell the Sheriff that because—I mean, he was suppose to be my friend.

Q. Now, that upset you then?

A. Yeah, I would have done anything for that man, your Honor. I just—I don't know, I got so upset and all, and I wanted to know why, and I got Jeff to take me into town and we picked up Ray and Marie and went by my [26] house and got my gun and took—well, we went back out to the river.

Q. Did you go get the gun first?

A. No, sir, after we picked them up.

Q. Did they—when you picked them up, did they know that you were mad and upset at them?

A. No, sir.

Q. All right, go ahead.

A. And we went back out to the river and got out of the car, and I had my gun in my hand. I asked Ray why he would go do something like that, and he said he didn't, and I asked him again, and he said he didn't, and so I shot by his feet, and he still said he didn't do it, and the next thing I knew, he was laying on the ground and Marie said it's cause you got a D.U.I. and the next thing I knew, we was leaving, and I was down in Gulfport, and then in a couple of days later I came back and turned myself in.

Q. All right, what about Mr. Willoughby, Mr. Jeff Willoughby, he was with you at the time?

A. Yes, sir.

Q. Do you know who went with you or how you got to Gulfport?

A. Jeff Willoughby took me to Gulfport.

Q. Jeff took you to Gulfport?

A. Yes, sir, Greg and Jeff went with me—well, Jeff took me to pick up Ray and Greg was with us.

Q. Now, Marie is his wife, you say?
A. I didn't know they were married or anything.
Q. Just girlfriend or staying together or something?
A. Yes, sir.
[27] Q. So really the only thing you know of is you were upset at him for the information you had gotten about him telling on you?
A. Yes, sir.
Q. That it had enraged you?
A. Yes, sir.
Q. And when you went by and got your gun at the house, you knew that you were going to shoot him then?
A. No, sir.
Q. What was the purpose of getting the gun then?
A. To try and get him to tell me why he did it.
Q. Had you had any drugs at that time?
A. Just marijuana and alcohol.
Q. You had no other type of drugs?
A. No, I don't believe that day, your Honor.

BY THE COURT: All right, does the State see any reason for a pre-sentence?

BY MR. DOUGLASS: The State does not, your Honor, but considering his past problems, did you ask him on the record if he was under the influence of any kind of alcohol or drugs?

BY THE COURT: Yes, sir.

BY MR. DOUGLASS: The State sees know reason, and I have discussed [28] this with law enforcement, and we've talked about this case at length, your Honor.

BY THE COURT: All right, based on what he's said Mr. Sheriff, do you see any reason for a pre-sentence to get any more details into his background, as far as you're concerned?

BY SHERIFF McKENZIE: No, sir.

BY THE COURT: All right, I've heard sufficient details that I will not require a pre-sentence report in this matter.

Mr. Garlotte, if you will step down with your attorney, I'll pass sentence.

DEFENDANT AND HIS ATTORNEY
APPROACHED THE BENCH

BY THE COURT:

Based upon your obvious remorse in this matter, and you experienced here today—indicated here today anyway, and from what I've heard, I see no reason not to go along with the recommendation of the State.

On the charge in 6011-2 of possession of marijuana with the intent to deliver or sell one ounce or less, I will sentence you to a term of three years in the custody of the Mississippi Department of Corrections.

[29] To the charge in 4230-2, to murder in Marion County, I will sentence you to life imprisonment in the custody of the Mississippi Department of Corrections, and that is to run consecutive and after the charge in 6011-2 on the possession of marijuana.

On the charge of murder in 4231-2, I will also sentence you to life in the custody of the Mississippi Department of Corrections, and I will, as recommended by the State, allow that sentence to run concurrent and along with the sentence imposed of life in 4230-2.

I'm going to say that these sentences are to start running as of today. You're remanded back into the custody of the Sheriff to start serving that sentence.

STATE OF MISSISSIPPI

FIFTEENTH CIRCUIT COURT DISTRICT

Jefferson Davis, Lamar, Lawrence,
Marion & Pearl River Counties

April 24, 1986

Mr. Harvey Garlotte
MSP #60710
Unit 29-C
Parchman, Ms. 39738

Dear Mr. Garlotte:

I have received your letter dated April 20, 1986, regarding your plea of guilty in the Marion County Circuit Court. I do not have the authority to allow you to withdraw your plea without going through the proper procedure. This procedure would be the Mississippi Uniform Post Conviction Collateral Relief Act which is the direction you need to take in seeking any relief in this Court. In the petition you file under this act you can present any new evidence, affidavits, etc. that you feel would warrant a hearing on the matter.

I trust this has sufficiently answered your questions.

Sincerely yours,

/s/ Michael R. Eubanks
MICHAEL R. EUBANKS

MRE/aa

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SENTENCE COMPUTATION DATA SHEET

NAME Harvey Garlotte

NO X60710
Unit 29
Parchman, Ms. 38738

TOTAL TERM OF SENTENCE LIFE & LIFE CC/&3 yrs.CS=LIFE

DATE OF SENTENCE 9-16-1985

JAIL TIME RECORDED 5 & 102 & 1 days

SENTENCE BEGAN 9-11-1985/6-1-1985/5-31-1985

MAXIMUM DISCHARGE DATE LIFE

EARNED TIME RECORD

Class IV 8-22-1988 (00000) Class III 9-1-1988 (8 days per mo.)

Class II (20 days per mo.) Class I (30 days per mo.)

Disciplinary Action On RVR #202-12(9-2-18)

APPLICABLE TO CLASS II AND CLASS III RESIDENTS ONLY

EARNED TIME AS RECORDED THROUGH

Total Amount of Time Accumulated

Current Discharge Date

MERITORIOUS EARNED TIME

Days Credited

Posting Period

Total MET Applied

Maximum amount of time that can be accumulated if continuously confined 481 days.

Between 10-16-1985 and 2-3-1987

EARLIEST POSSIBLE DISCHARGE DATE IF CONTINUOUSLY CONFINED LIFE

Time lost for Disciplinary Action days

Total amount of time lost on this sentence days.

Earned Time Restored days Total Earned Time Restored on sentence days.

THE AMOUNT OF EARNED TIME ACCUMULATED IS CONTINGENT UPON:

1. Class Status
2. Continuous confinement
3. Disciplinary Action (loss of earned time, stoppage and/or class demotion)
4. Conditions applicable to sentence under State Statute, (this applies to certain drug charges, armed robbery and attempted armed robbery offenses.)
5. No earned time can be accumulated if sentenced as an habitual offender.

IMPORTANT:

The above information is based on your present status and is subject to change at any given time. Earned time will be discontinued the date of release and your discharge date will be adjusted to allow you only the amount of time that could be accumulated prior to release.

PAROLE ELIGIBILITY DATES

Minimum Time Required by Statute 5-1-1996 . PRESUMPTIVE PAROLE DATE

SER 999999 . (Parole Board Action)

WR 9999999

Fine, Court Cost, Restitution Outstanding

This must be paid or an acceptable schedule of payment submitted to the Court prior to release on the above date. Failure to comply with the Orders of the Court in this regard could result in service of maximum term of sentence.

Director of Records
Records Department
Mississippi State Penitentiary
Parchman, Mississippi 38738

Date October 19, 1988 nb

SENTENCE COMPUTATION DATA SHEET

NAME GARLOTTE, HARVEY
NO. X60710
SMCI
P. O. BOX 1419
LEAKSVILLE, MS 39451

TOTAL TERM OF SENTENCE LIFE

DATE OF SENTENCE 9-16-1985

JAIL TIME RECORD 5DAYS & 102DAYS & 1DAY

SENTENCE BEGAN 9-11-1985/6-1-1985/5-31-1985

MAXIMUM DISCHARGE DATE LIFE

EARNED TIME ALLOWANCES (50% SENTENCE) 1YR. 6MONTHS

M.E.T. ALLOWANCE 180DAYS
(MET forfeited shall not be restored nor shall it be re-earned by the offender)

EXECUTIVE TIME ALLOWANCE

TIME OUT ON ESCAPE CREDIT ALLOWED FROM (DATE)

TIME OUT ON PAROLE

CREDIT ALLOWED FROM(DATE)

EARNED TIME FORFEITED

MET FORFEITED

EARLIEST PAROLE ELIGIBILITY DATE 12-2-1995

EARLIEST CONDITIONAL DISCHARGE DATE LIFE

EXCLUSIONS:

1. LIFE SENTENCE (X)
2. HABITUAL OFFENDER ( )
3. EARNED TIME ALLOWANCE FORFEITED BY ORDER OF THE COMMISSIONER: ( )
4. SEX OFFENDER(S) DENIED PAROLE BASED ON PSYCHOLOGICAL/PSYCHIATRIC EXAMINATION: ( )
5. MANDATORY ARMED ROBBERY SENTENCE ( )

CONDITIONS:

TIME COMPUTATION OF CONSECUTIVE SENTENCE IS BASED ON EACH INDIVIDUAL SENTENCES.

NO INMATE IN ANY EVENT SHALL HAVE HIS SENTENCE TERMINATED BY ADMINISTRATIVE EARNED TIME ACTION UNTIL HE IS ELIGIBLE FOR PAROLE.

11-13-1992PS
DATE

(MS.) CHRISTINE HOUSTON
CHIEF RECORDS OFFICER

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PS

SENTENCE COMPUTATION RECORD

NUMBER X60710

NAME GARLOTTE, HARVEY COUNTY MARION/LAMAR

DATE OF ARREST

DATE RELEASED ON BOND

TERM OF SENTENCE:

LIFE & LIFE CC &

3YRS. CS

NUMBER OF DAYS JAIL TIME ALLOWED 5DAYS & 102DAYS & 1DAY

DATE RECEIVED 10-1-1985

DATE OF SENTENCE 9-16-1985

SENTENCE BEGIN 9-11-1985/6-1-1985/5-31-1985

TOTAL SENTENCE

LIFE

MAXIMUM DISCHARGE DATE LIFE

Minimum Discharge Date on 1 year sentences (NOT TO BE DISCHARGED PRIOR TO 11 MOS. CONFINEMENT.)

DATE	CLASS	CREDITS ALLOWED	CREDITS FORFEITED	CREDITS RESTORED	SER DATE	EARLIEST WORK-RELEASE DATE	EARLIEST PAROLE DATE	DISCHARGE DATE
9-16-1985		50% OF	THREE(3 YR)	SENTENCE	SENATE BILL #2030		9-11-1986	3-11-1987
7-1-1986		ADDITIONAL 102DAYS JAIL TIME FROM					6-1-1986	11-29-1986
9-4-1986		6-6-1985 TO 12-1 -1984 ADDITIONAL 1DAY JAILTIME ALLOWED FROM					5-31-1986	11-28-1986
11-13-1992		12-10-1984 TO 12-11-1934 180DAYS MERITORIOUS EARNED TIME					12-2-1985	6-1-1986
9-16-1985		ADDITIONAL LIFE & LIFE CC SENTENCE					12-2-1995	LIFE

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SUPREME COURT OF THE UNITED STATES

No. 94-6790

HARVEY F. GARLOTTE,
Petitioner

v.

KIRK FORDICE,
Governor of Mississippi

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 1, 1995. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 29, 1995. Rule 29.2 does not apply.

January 20, 1995